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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

NO. 73-554

PHILIPPINE ACE LINES,

Petitioner,

vs.

SEATTLE STEVEDORE COMPANY,
a corporation,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respectfully submitted,
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PRAYN PRINTING COMPANY SEATTLE, WASHINGTON

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TABLE OF CONTENTS

Page

Statement of the Case 1

Reasons for Granting Writ 2

Conclusion 8

TABLES OF AUTHORITY

Cases

Page

Burkhard v. Burkhard, 175 F.2d 593, 596 (CA 10, 1949) 8

Crumrady v. "Joachim Hanrik Fisser", 358 U.S. 432, 3 L.Ed.2d 413, 79 S.Ct. 445 (1959) 5

Delaneuville v. Simonsen, 437 F.2d 597, 602 (CA 5, 1971) 5

Guidry v. Texaco, Inc., 430 F.2d 781 (1970) 6

Italia Societa v. Oregon Stevedoring Co., 376 U.S. 315, 11 L.Ed.2d 732, 84 S.Ct. 748 (1964) 6

Matton Oil Transfer Corporation v. The Dynamic, 123 F.2d 999 (CA 2, 1941) 7

Ryan Stevedoring Co. v. Pan-Atlantic S. S. Corp., 350 U.S. 124, 100 L.Ed. 133, 76 S.Ct. 232 (1955) 3, 4

Switzer Bros., Inc. v. Locklin, 297 F.2d 39, 45 (CA 7, 1961) *cert. denied*, 369 U.S. 851 (1962) .. 8

Waterman S. S. Corp. v. Dugan & McNamara, 364 U.S. 421, 5 L.Ed.2d 169, 81 S.Ct. 200 (1960).. 6

Weyerhaeuser S. S. Co. v. Nacirema Co., 355 U.S. 563, 2. L.Ed.2d 497, 78 S.Ct. 438 (1958) 4

Rules

FRCP 52 (a) 7

Rule 19, Supreme Court Rules 9

Texts

Norris, *The Law of Seamen* 4

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STATEMENT OF THE CASE

Respondent can accept the Petitioner's statement of the case except for two inaccuracies or omissions.

First, Respondent wishes to make it abundantly clear that it at all times denied that it had breached its warranty of workmanlike performance.

Secondly, Respondent disagrees with Petitioner's statement that the Court's only meaningful action was in its Finding of Fact 14:

> "That plaintiff failed to prove by a preponderance of the evidence that defendant breached its warranty of workmanlike service in conducting the stevedore operations aboard the SS TINDALO on October 27, 1967."
> (R. 66.)

The Court clearly found that if anyone breached its warranty of workmanlike performance, it was not the Respondent, but was the stowing stevedore in Japan. The Court found in Finding of Fact 12:

> "The stowing or loading stevedore in Japan failed to properly lash or shore the cargo of pipe in the upper 'tween deck No. 2 Hatch of the SS TINDALO, permitting it to shift athwartships and other directions during its voyage from Japan to Seattle, Washington in October 1967, * * *."
> (R. 65.)

and in ruling on the sufficiency of Petitioner's proof, concluded:

> "I think the wrong stevedore had been sued here."
> (Tr. 41.)

REASONS FOR GRANTING WRIT

1. Decision of the Court of Appeals is inconsistent with and contrary to prior decisions of this Court.

It is axiomatic that "the facts make the law." Petitioner cites cases with reference to the stevedore's warranty of workmanlike performance. Yet each of these cases begs the factual question in-

volved in the instant case. Petitioner has not cited a single case in which indemnity was imposed in the absence of one of the following conditions:

(1) The stevedore company was negligent in performance of its cargo handling operation;

(2) The stevedore company utilized an improper method of loading or discharge;

(3) The stevedore company supplied or utilized defective gear in its cargo operation; or,

(4) The injured longshoreman, provided by the stevedore, was contributorily negligent (negligence imputed to stevedore company).

None of these factors was found to exist by the trial court, nor was there evidence to support such a conclusion.

In *Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp.*, 350 U.S. 124, 100 L.Ed. 133, 76 S.Ct. 232 (1955), a discharging longshoreman was injured due to improper *stowage of* 3200-pound rolls of paper. The cargo was improperly secured and the stowing stevedore failed to utilize wedges and dunnage to hold the rolls in place. Indemnity was imposed against the stowing stevedore. Coincidentally, the stowing stevedore was also the discharging stevedore; however, the breach of workmanlike service was due to the improper method of stowing and in no way related to the method of discharge or to any contributory negligence of the injured longshoreman. The court observed:

> "And a like liability for breach of contract accrues to a shipowner against a stevedoring

contractor in any instance when the latter's improper stowage of cargo causes an injury on shipboard to some one other than one of its employees. The coincidence that the loading contractor here happens to be the employer of the injured longshoreman makes no difference in principle.

"* * *.

"The shipowner here holds petitioner's uncontroverted agreement to perform all of the shipowner's stevedoring operations at the time and place where the cargo in question was loaded. That agreement necessarily includes petitioner's obligation not only to stow the pulp rolls, but to stow them properly and safely. Competency and safety of stowage are inescapable elements of the service undertaken." *Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp.*, 350 U.S. 124, 100 L.Ed. 133, 140, 141, 142 (1955).

In the instant case, we would agree with the Petitioner that it may well have a valid claim for breach of warranty of workmanlike performance due to improper stowage against the stowing stevedore in Japan. As the trial court noted, "I think the wrong stevedore has been sued here." (Tr. 41.)

The Petitioner's allusion to Norris, *The Law of Seamen*, may be relevant to the stowing stevedore in Japan, but certainly has no applicability to the Respondent here.

In *Weyerhaeuser S.S. Co. v. Nacirema Co.*, 355 U.S. 563, 2 L.Ed.2d 497, 78 S.Ct. 438 (1958), the trial court directed a verdict for the stevedore on the third party claim. At the outset the Supreme Court noted:

"The question here involves the right to trial by jury under principles of maritime liability * * *."

and held that it was improper for the court to direct a verdict. The Supreme Court merely reversed on the indemnity issue for submission of that issue to the jury as the finder of the facts. It is unknown how the issue was determined following remand. Here the trial court, as trier of the facts, has resolved that issue for the Respondent on the evidence. The court found no substandard performance by the Respondent nor was there evidence to support such a conclusion. The comment of the court in *Delaneuville v. Simonsen,* 437 F.2d 597, 602 (CA 5, 1971), is appropriate here:

> "Indemnity was denied, not because the conduct of Shipowner precluded enforcement, but rather because Stevedore did not breach its WWLP. This result is faithful to Weyerhaeuser Steamship Co. v. Nacirema Operating Co., 1958, 355 U.S. 563, 78 S.Ct. 438, 2 L.Ed.2d 491, 1958 A.M.C. 501."

In *Crumady v. "Joachim Hanrik Fisser",* 358 U.S. 423, 3 L.Ed.2d 413, 79 S.Ct. 445 (1959), the trial court, as trier of the facts found that the stevedore utilized a circuit breaker set at twice the safe working load and moved the head of the boom in an effort to clear the cargo from the sides of the hatch and that this created a load on the topping-lift greatly in excess of its safe working load. This was the primary cause of the parting of the topping-lift and consequent fall of the boom. The trial court's findings of negligence and improper method were supported by two expert witnesses. The Supreme Court affirmed the trial court's imposition of indemnity due to the *negligence* of the stevedore, which brought the ship's unseaworthiness into play.

In the instant case there was no evidence of negli-

gence nor improper method on the part of the Respondent stevedore to support any such finding. The trial court found the proof deficient (Tr. 41, 42, 44, and F.F. 14).

In *Waterman S.S. Corp. v. Dugan & McNamara*, 364 U.S. 421, 5 L.Ed.2d 169, 81 S.Ct. 200 (1960), the district court had directed a verdict for the stevedore company, holding that a shipowner had no right for indemnity in absence of a direct contractual relationship between them. The Supreme Court reversed, holding that privity was not a necessary prerequisite and remanded the case to the district court for retrial of the indemnity issue. It is unknown how the issue was determined following the remand, but it is possible that indemnity was allowed based upon the improper method in removing the lateral support from the vertical column of hundred-pound bags in the unloading operation, allowing it to collapse and injure the longshoreman.

Italia Societa v. Oregon Stevedoring Co., 376 U.S. 315, 11 L.Ed.2d 732, 84 S.Ct. 748 (1964), is illustrative of cases allowing indemnity where the stevedore has supplied and utilized defective gear. There, the unseaworthiness was created by a defective rope, unfit for its intended use, supplied by the stevedore company. The instant case did not involve any defective gear.

2. The decision of the Ninth Circuit conflicts with the decision of the Fifth Circuit in *Guidry v. Texaco, Inc.*, 430 F.2d 781 (1970).

Petitioner's contention is without foundation. *Guidry v. Texaco, Inc.*, 430 F.2d 781 (1970), differs

factually from the case at bar and in no way conflicts with the decision herein. There the court found that the ship repairer breached its warranty of workmanlike performance in utilizing a hazardous method of discharging the pipes, and in utilizing tools and personnel not reasonably suitable for the job at hand. In the instant case there was no evidence of improper method, nor of unsuitable tools, gear, or personnel. Consequently, the trial court found that the Petitioner failed to prove that the Respondent breached its warranty of workmanlike performance (F.F. 14, R. 66). The trial court's findings are not clearly erroneous.

3. The District Court did not perform its duty under FRCP 52(a) in that the District Court failed to "find the facts specially and state separately its conclusions of law thereon."

Contrary to Petitioner's assertion, the Court's Findings of Fact did meet the requirements of FRCP 52(a). In the case cited by Petitioner, *Matton Oil Transfer Corporation v. The Dynamic,* 123 F.2d 999 (CA 2, 1941), the Court made absolutely *no* Findings of Fact. Furthermore, the Court there observed:

> "We realize that to enforce the rule in an over-scrupulous way may impose onerous labors on a district judge, beyond those actually needed for a fair presentation of an appeal. We think it appropriate to say that we are not disposed towards such an enforcement, nor have we at any time required any overelaboration of detail or particularization of facts. We agree fully with the spirit and the terms of the reso-

> lution passed by majority vote of the judges at our Judicial Conference of last June recommending 'that the trial judge make brief, pertinent findings in respect to contested matters and file the same in connection with his opinion.' This puts the emphasis where it should be, namely, on brief and pertinent findings of contested matters, and also upon a finding made as a part of the judge's opinion and decision, rather than the delayed, argumentative, overdetailed documents prepared by winning counsel after the event which often appear in appellate records, though they are not effective aids to adjudication. See Gibbs v. Buck, 307 U.S. 66, 78, 59 S.Ct. 725, 732, 83 L.Ed. 1111; Epstein v. Goldstein, 2 Cir., 107 F.2d 755, 758.
>
> "Of course, we do not mean to imply that a trial court is not privileged to seek such aid of counsel, both as to the facts and the law, * * *."

In the instant case, the Ninth Circuit noted that Petitioner failed to request more specific findings. (A-2.) *Switzer Bros., Inc. v. Locklin,* 297 F.2d 39, 45 (CA 7, 1961), *cert. denied,* 369 U.S. 851 (1962); *Burkhard v. Burkhard,* 175 F.2d 593, 596 (CA 10, 1949).

CONCLUSION

The issue in the instant case was strictly factual —an issue resolved in favor of the Respondent by the District Court and affirmed by the Ninth Circuit Court of Appeals. In this regard, the decision sought to be reviewed is in no way in conflict with another court of appeals or this Court. Nor can it be said that there are any special and important rea-

sons for granting review within the contemplation of Rule 19, Supreme Court Rules. Accordingly, the petition for writ of certiorari should be denied.

Respectfully submitted,

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